



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 10 OF 2015 (UR 8/2015)

BETWEEN

MASENO UNIVERSITY APPLICANT

AND

RILEY FACON SECURITY

SERVICES LIMITED 1ST RESPONDENT

BEDROCK HOLDINGS LIMITED 2ND RESPONDENT

(An application for stay of further proceedings pending the filing, hearing and determination of an intended appeal to this Honourable court from the Order of the High Court of Kenya at Kisumu, (Maina, J.) dated 27th November, 2014

in

H.C.C.C. NO. 22 of 2014)

RULING OF THE COURT

1. In a ruling delivered on 27th November 2014 in High Court Civil Suit No.22 of 2014, the High Court at Kisumu, (E. N. Maina, J.) allowed an application by the 1st respondent barring the firm of Wasuna & Company Advocates from representing the applicant in that suit. The basis of that ruling was that Mr. F. N. Wasuna who witnessed a contentious agreement the subject of that suit was a potential witness and that it would be prejudicial for that law firm, which drew that agreement, to continue representing the applicant.

2. The applicant intended to challenge that ruling in an appeal to this Court. Pending the hearing and determination of the intended appeal, the applicant presented an application to this Court on 25th March 2015 under Rule 5(2)(b) of the Rules of this Court seeking an order to stay further proceedings in High Court Civil Suit No. 22 of 2014 pending “*the filing, hearing and final determination of the intended appeal.*”

3. That application was first scheduled for hearing before this Court on 1st July 2015. It was not heard on that date because the Court allowed an adjournment on grounds that Mr. F. Wasuna had to attend to an emergency that morning. The application was subsequently fixed for hearing before this Court on 23rd September 2015 when it was dismissed.

4. Before us now, is the applicant's motion dated 13th October 2015 presented under Rule 56 of the Rules of the Court. The applicant seeks an order for the reinstatement or restoration of its application dated 25th March 2015.

5. When that application came up for hearing before us on 29th February 2016, Mr. C. Onyango learned counsel holding brief for Mr. Wasuna for the applicant referred us to the affidavit sworn by Antony Odhiambo Wasuna in support of the application and urged that the applicant has demonstrated sufficient cause why counsel for the applicant failed to attend Court on 23rd September 2015 to prosecute the application. In that affidavit, Mr. Wasuna deposed that on reaching his office on the morning of 23rd September 2015, he realized he had omitted to lock his house and had to return to his house in order to secure it; that he requested Mr. Gichaba advocate to hold his brief with instructions to request for the court file to be placed aside until 10.30 am; that on reaching the Court precincts he was informed by his firm's court clerk that a matter involving his law firm was being called out before the High Court; that he went to the High Court and by the time he got to this Court at about 10.30 the application dated 25th March 2015 had been dismissed.

6. He urged the Court not to visit the mistakes of counsel on the innocent applicant and urged us to allow the application.

7. Opposing the application, Mr. Gachuba learned counsel for the 1st respondent, referred us to a replying affidavit filed on 6th November 2015 and a supplementary affidavit filed on 24th February 2016, both sworn by Tobias See, a director of the 1st respondent and submitted that the applicant does not deserve the exercise of the Court's discretion on account of its dilatory conduct in this matter; that the intended appeal is not merited; that in any event the applicant has already appointed another firm of advocates to conduct the matter on its behalf in the High Court.

8. We have considered the application and the submissions by learned counsel. On 23rd September 2015, Mr. Gichaba did on behalf of Mr. Wasuna request the Court to place the file aside to await the arrival of Mr. Wasuna. The Court acceded to that request but by the time the file was called out a second time, neither Mr. Gichaba nor Mr. Wasuna were in Court with the result that the matter was dismissed. As already noted, this was not the first time the matter had come up for hearing. It had previously been adjourned at the instance of Mr. Wasuna. Furthermore, we have noted from the exhibit to the affidavit of the 1st respondent that the applicant has already appointed another law firm to represent it in the matter in the High Court and agree with counsel for the 1st respondent that in the circumstances no prejudice is occasioned to the applicant. We are therefore not satisfied that sufficient grounds have been made out for us to grant the order for restoration of the application dated 25th March 2015.

The application dated 13th October 2015 is hereby dismissed with costs to the 1st respondent.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true
copy of the original.

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DEPUTY REGISTRAR